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SERVICE DATE - LATE RELEASE DECEMBER 31, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34255

PORTLAND & WESTERN RAILROAD, INC. — LEASE AND OPERATION
EXEMPTION — THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Finance Docket No. 34304

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY — TRACKAGE
RIGHTS EXEMPTION — THE PORTLAND & WESTERN RAILROAD, INC.¹

Decided: December 31, 2002

On November 21, 2002, in STB Finance Docket No. 34255, Portland & Western Railroad, Inc. (P&WR), a Class III carrier, filed a notice of its intent to file an exemption notice pursuant to 49 CFR 1150.41, to exempt from regulation under 49 U.S.C. 10902 its lease and operation of an approximately 76.75-mile line of railroad currently owned and operated by The Burlington Northern and Santa Fe Railway Company (BNSF), from milepost 64.70 located between Quinaby and Salem, OR, to the End of Track at milepost 141.45 near Eugene, OR.

On December 6, 2002, P&WR filed its notice of exemption. Originally, as part of the transaction, P&WR stated that it intended to grant what it calls “incidental” overhead trackage rights to BNSF over the rail line between Bush (milepost 68.6) and Albany (milepost 96.5), and to Central Oregon & Pacific Railroad, Inc. (CORP), between Albany (milepost 96.5) and Eugene (milepost 141.5). However, by letter filed on December 23, 2002, P&WR withdrew its request to grant trackage rights to CORP. On December 20, 2002, BNSF, in STB Finance Docket No. 34304, separately filed a verified notice of exemption that would authorize it to obtain the trackage rights between Bush and Albany. On December 23, 2002, BNSF filed a motion to dismiss that exemption, arguing that separate Board approval is not required for those rights.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

Also on December 23, 2002, John D. Fitzgerald, on behalf of the United Transportation Union-General Committee of Adjustment (petitioner), filed a petition for stay of both exemptions. In a decision served on December 26, 2002, the Chairman denied the stay request (December 26 decision).

On December 30, 2002, BNSF and P&WR filed a letter with the Board stating that the lease transaction had been consummated as of December 29, 2002, and that the trackage rights would begin to be operated on December 30 or 31, 2002.

Also on December 30, 2002, petitioner filed an appeal, pursuant to 49 CFR 1115.2,² from the December 26 decision of the Chairman. Petitioner again requests a stay of the operation of the exemption in STB Finance Docket No. 34255,³ and if a stay is not entered in that proceeding, petitioner requests a stay in STB Finance Docket No. 34304. Petitioner's requests will be denied.

DISCUSSION AND CONCLUSIONS

At the outset, any petition for a stay must demonstrate immediate and irreparable harm. We now note, as was noted in the December 26 decision, that there is no irreparable harm in this matter since there is no aspect of this transaction that could not be unwound by the Board in a decision on the merits based on a fully developed record.

Petitioner raises four grounds for appeal. First, petitioner maintains that new evidence raised in the comments filed by the State of Oregon on December 23, 2002 (Oregon's comments), indicates that the transaction will adversely affect the environment, and community safety, and will raise other issues of concern to local government. The information presented in Oregon's comments is not new evidence, as it was received and considered by the Board prior to the December 26 decision, and does not demonstrate irreparable harm. Moreover, while the State has some concerns regarding the transaction, it generally supports it.

Second, petitioner asserts that irreparable injury will occur if the BNSF trackage rights transaction is not stayed because the employee protective conditions of Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry. — Lease & Operate, 360 I.C.C. 653 (1980), aff'd sub nom. Railway Labor Exec. Ass'n v. United States, 675

² The Chairman's action in the December 26 decision was taken pursuant to 49 CFR 1011.4(a)(2) [formerly 49 CFR 1011.5(a)(2)].

³ The lease transaction contemplated in STB Finance Docket No. 34255 was scheduled to be consummated on December 27, 2002, three days before this appeal was filed.

F.2d 1248 (D.C. Cir. 1982) — specifically the 20-day notice requirement of section 4 — would not be met. Petitioner has not demonstrated that a stay is required to give effect to that provision, which is self-executing.

Third, petitioner argues that there is a high probability of success on the merits. In this regard, petitioner states that it will be able to show “joint use” because the stations on the Quinaby-Eugene line will be both P&WR and BNSF stations and because BNSF is upgrading 20 miles of line that BNSF will not utilize. As noted in the December 26 decision, petitioner has not demonstrated a likelihood of success on the merits, but in any event, these issues are better addressed in the context of a fully developed petition for revocation.

Fourth, petitioner asserts that the December 26 decision was inadequate because it did not separately address each of the four generally accepted considerations for granting a stay. Under Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), however, a movant must make a showing as to each of the four criteria in order to prevail on a stay request; if it fails in its showing on any one of the criteria, its stay request may be denied. Here, as the December 26 decision found, petitioner has not shown that there would be irreparable harm absent a stay, or that there is a strong likelihood that petitioner will prevail on the merits.

Finally, petitioner raises one issue beyond its application for a stay, arguing that the classification of “highly confidential” should be removed from the BNSF/P&WR lease. We disagree. The level of confidentiality accorded a document is determined by the parties submitting that document. BNSF and P&WR requested the lease be “highly confidential” due to the nature of the business information contained therein, and object to any change in its classification. Petitioner alleges that this document should be changed from “highly confidential” to a lesser classification because it contends that union employees should be able to review the document. Petitioner has not shown why all employees need access to the lease—and thus why there is a need for a general reclassification of the lease document. However, we do note that petitioner may, on a case-by-case basis, request individual waivers for specific individuals to view the lease if it can make a particularized showing that the identified individuals have a need to review the agreement after execution of proper confidentiality safeguards.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioner’s appeal is denied.
2. The petition for stay in STB Finance Docket No. 34255 is denied.

3. The petition for a stay in STB Finance Docket No. 34304 is denied.
4. Petitioner's request for removal of the "highly confidential" classification of the lease agreement is denied.
5. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.

Vernon A. Williams
Secretary